IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 37 of 1990

For Approval and Signature:

Hon'ble MR.JUSTICE J.M.PANCHAL

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

HARSHADRAI M BHATT

Versus

GRAMODYOG KENDRA

Appearance:

1. Criminal Appeal No. 37 of 1990

MR PRANAV G DESAI for the appellant.

NOTICE SERVED for Respondents No. 1 to 3

MR DP JOSHI, APP for Respondent No. 4-State

CORAM : MR.JUSTICE J.M.PANCHAL

Date of decision: 08/11/2001

ORAL JUDGEMENT

By filing this appeal under section 378 of the Code of Criminal Procedure, 1973, the appellant, who is

Food Inspector, Vadodara, has challenged the legality of judgment dated January 2, 1989 rendered by the learned Judicial Magistrate, First Class (Muni.), Vadodara, in Criminal Case No. 4561/86, by which the respondents no.1 to 3 are acquitted of the offences punishable under sections 7 & 16 of the Prevention of Food Adulteration Act, 1954 ("the Act" for short).

2. The appellant, who is Food Inspector attached to Baroda Municipal Corporation, visited the shop of the respondent no.1 on April 4, 1986 and purchased 600 grammes of turmeric powder from a container for the purpose of analysis. The Food Inspector divided the sample into three equal parts and prepared three separate samples, each kept in separate bottle. After various formalities, one of the sample bottles was sent to Public Analyst for analysis. The report of the Public Analyst indicated that the sample analysed was adulterated. Therefore, the Food Inspector obtained written consent of the competent authority for prosecuting the respondents no.1 to 3 and filed a complaint in the Court of learned Judicial Magistrate, First Class (Muni.) at Baroda. In the course of trial, at the request of the respondents no.1 to 3, the third sample was sent to the Central Food Laboratory for analysis. The report of the Central Food Laboratory indicated that the sample was adulterated. On appreciation of evidence, the learned Magistrate held that the written consent obtained for instituting prosecution against the respondents no.1 to 3 was bad in law. It was found by the learned Magistrate that the sample purchased by the Food Inspector for analysis was not homogeneous or representative in character. In view of the above referred to conclusions, the learned Magistrate has acquitted the respondents no.1 to 3 by judgment dated January 2, 1989, giving rise to the present appeal.

3. Mr. P.G.Desai, learned counsel for the appellant submitted that the analysis report which indicated that the sample analysed was adulterated as well as other pertinent materials in connection therewith were placed before the authority giving consent to prosecute and as the authority after going through the materials had granted written consent to prosecute, it could not have been invalidated on the ground of non-application of mind. The learned counsel further submitted that it is not requirement of law that the sample purchased for analysis should be homogeneous in character and, therefore, a wrong reason has been assigned by the learned Magistrate for acquitting the respondents no.1 to 3. According to the learned counsel for the appellant,

acquittal of the respondents no.1 to 3 is not well-founded at all and, therefore, the appeal should be accepted. In support of his submissions, the learned counsel placed reliance on the decisions of the Supreme Court rendered in (i) State of Kerala v. Alasserry Mohammed, AIR 1978 SC 933, and (ii) Suresh H. Rajput & Ors. v. Bharatiben Pravinkumar Soni & ors. (1996)7 SCC 199.

4. Mr.D.P.Joshi, learned A.P.P. adopted the arguments advanced by the learned counsel for the appellant and pleaded that acquittal of the respondents no.1 to 3 being erroneous in law should be set aside by the Court.

5. Though the respondents no.1 to 3 are duly served, they have neither appeared through their lawyer or in person.

6. I have considered the submissions advanced at the Bar by the learned counsel for the appellant as well as the learned counsel for the respondent no.4 and reappreciated the whole evidence on record.

7. The record of the case shows that the respondent no.1 is one of the establishments of Vadodara District Khadi Gramodyog Sahakari Sangh Ltd. The Sahakari Sangh Ltd. is a society registered under the provisions of the Gujarat Co.operative Societies Act, 1961, whereas the respondent no.2 i.e. Ranchhodbhai Bavabhai Patel was the President of the said Co.operative Society at the relevant time and the respondent no.3 i.e. Indravadan Ravjibhai Patel was serving as an accountant in the Gramodyog Kendra. It is true that before written consent to prosecute the respondents no.1 to 3 was granted, the Food Inspector had placed before the competent authority granting written consent the report of the Public Analyst, but written consent does not indicate that any other relevant fact was considered by the authority before granting written consent to prosecute. The Food Inspector while applying for written consent to prosecute, had not mentioned whether the respondent no.1 which is one of the establishments of the Co.operative Society, was a company or not within the meaning of section 17 of the Act or that the respondent no.2 was in charge of and responsible for the conduct of the Gramodyog Kendra or that the respondent no.3, who was the accountant, was in charge of and responsible to the Gramodyog Kendra. It is pertinent to note that the Food Inspector had received report of the Public Analyst on April 9, 1996 and had made an application to obtain

written consent on the same day i.e. on April 9, 1986. Further the competent authority had granted written consent to prosecute on April 9, 1986 and the complaint was lodged against the respondents no.1 to 3 by the Food Inspector in the Court of learned Judicial Magistrate, First Class (Muni.), Vadodara on April 9, 1986. In light of these facts, the question of non-application of mind on the part of the competent authority who granted written consent to prosecute, has to be viewed. The record of the case shows that the respondent no.3 who was accountant, was prosecuted as the person who was in charge of and responsible to the society for the conduct of the business carried on at the Gramodyog Kendra and accordingly, his further statement under section 313 of the Code of Criminal Procedure, 1973 was recorded. No particulars were submitted by the Food Inspector before the competent authority who had granted written consent to prosecute,to show that the respondent no.3 who was accountant, was in charge of and responsible to the society for the conduct of the business carried on at the Gramodyog Kendra, nor any particulars were supplied to the competent authority showing that the respondent no.2, who was the President of the Co.operative Society, was in charge of and responsible to the society for the conduct of the business of the society being carried on at the Gramodyog Kendra. Under the circumstances, there is no manner of doubt that the relevant facts were not taken into consideration by the authority, who had granted written consent to prosecute and, therefore, the finding recorded by the learned Magistrate that the written consent to prosecute is bad in law, being eminently just is hereby upheld. Further the Food Inspector in his cross-examination has admitted that the respondent no.2 who was then President of the Co.operative Society, was not concerned with day to day purchase and sale of the commodities at the Gramodyog Kendra. The Food Inspector has further admitted that the respondent no.3 was discharging duties as an accountant in the society and that his function was only to maintain accounts of the society. Viewed in the light of admissions made by the Food Inspector in his substantive evidence before the Court, it cannot be said that the Food Inspector had placed relevant facts before the authority who had granted written consent to prosecute. Therefore, the written consent to prosecute the respondents no.1 to 3 is rightly invalidated by the learned Magistrate. On the facts and in the circumstances of the case, I am of the view that the principle laid down by the Supreme Court in Suresh H. Rajput & ors. (supra) is not applicable to the facts of the present case and written consent to prosecute cannot be held to be valid on the basis of the

said judgment. Thus, the first ground assigned by the learned Magistrate for acquitting the respondents no.1 to 3 is found to be correct one.

8. The contention that the sample purchased for analysis need not be homogeneous, is also not well-founded. In State of Kerala (Supra), the Supreme Court had occasion to determine the question of law whether non-compliance with the requirements of Rule-22 of the Prevention of Food Adulteration Rules,1955 vitiates the trial or the conviction recorded under section 16(1)(a)(i) of the Act. It was noticed by the Supreme Court that in Rajal Das G. Pamanani v. State of Maharashtra (1975) 2 SCR 886, the conviction of the appellant was set aside on the ground :-

"The Public Analyst did not have the quantities mentioned in the Rules for analysis. The appellant rightly contends that non-compliance with the quantity to be supplied caused not only infraction of the provisions, but also injustice. The quantities mentioned are required for correct analysis. Shortage in quantity for analysis is not permitted by the statute."

The larger bench was constituted for examining the correctness of the above view. Rule-22 of the Rules prescribes quantity of sample to be sent to the Public Analyst. It was contended that Rule-22 was mandatory and not directory. The Supreme Court on interpretation of Rule-22 has held that the rule is directory and not mandatory. Further it was argued that if less quantity of sample is sent to the Public Analyst, it cannot be said that representative sample was sent to the Public Analyst for analysis and, therefore, the analysis conducted would stand vitiated. While negativing this argument, the Supreme Court has observed as under in Para-13 (Page-939) of the reported decision :-

"13. We may now briefly deal with some of the submissions made on behalf of the respondents. In support of the decision of this Court in Pamanani's case (AIR 1975 SC 189). It was argued with reference to Methods in Food Analysis, second edition by Maynard A. Joslyn that the sample must be a representative sample. It is with that view that the quantity was prescribed in Rule-22 and should not be permitted to be tampered with in any manner. We are not impressed by this argument at all. A representative sample has got a different connotation, meaning and

purpose in commercial transactions. If, for instance, an average price is to be fixed for a huge quantity of, say, wheat lying in bulk in different storages, then samples must be taken from all the storages to make them a representative sample of the entire quantity for the fixation of the average price. Taking sample from one storage will not be sufficient. In our statute the ingredient of the offence is, as mentioned in the 7th section of the Act, manufacturing for sale, storing, selling or distributing any adulterated food. If the food sold to the Inspector is proved to be adulterated,it is immaterial whether the sample purchased by him is a representative sample or not of the entire stock in possession of the person. A person who stores or sells such sample is liable to be punished under section 16(1)(a)(i) of the Act."

Thus, the question whether the sample which is taken for analysis should be homogeneous or representative in character or not was not considered by the Supreme Court in the above quoted decision. In Food Inspector, Municipal Corporation, Baroda v. Madanlal Ramlal Sharma & anr., AIR 1983 SC 176, the Supreme Court while approving churning in connection with milk preparations has held that churning by hand is sufficient to make the sample taken for analysis a homogeneous and representative sample. The pertinent observations made by the Supreme Court in Para-8 of the reported decision are as under :-

"Our attention was not drawn to any provision in the Act or the Rules making it obligatory that churning should be done with some machine so as to make a sample homogeneous and representative sample. We are conscious of the fact that in milk and milk preparations including curd, it is distinctly possible that the fat settles on the top and in order to find out whether the milk or its preparation such as curd has prescribed content, the sample must be homogeneous and representative so that the analysis can furnish reliable proof of nature and content of the article of food under analysis. For this purpose churning is one of the methods of making the sample homogeneous and representative. But having said this, there is nothing in the Act or the Rules which prescribes that churning must be done by some instrument and that churning done by

> hand would not provide a homogeneous and representative sample. Common sense dictates that articles of food like milk and curd when churned with hand would properly mix-up from top to bottom. More so when the quantity is either 600 grams which was the quantity purchased out of 2 1/2 Kgs. which was the quantity in the container. There was evidence that the churning was done by spoon. But even if the High Court found that evidence unreliable and evidence of defence witness Devsibhai Ramjibhai so much reliable that it was prepared to act upon it disagreeing with the other evidence, the evidence of Devsibhai Ramjibhai was that churning was done with hand and he didnot say that the churning was not effective.

The above quoted observations make it clear that before purchasing sample for analysis it should be made homogeneous and representative in character. Further in K. Harikumar v. Food Inspector, Punaloor Municipality, 1995 Supple.(3) SCC 405, the Supreme Court has held that stirring and churning of curds before taking of sample is necessary and if possible, curds must be given a vertical cut. What is emphasised therein is that in order to attain homogeneity in curds, stirring/churning, as the case may be, becomes necessary for the ingredients of milk solid non-fat and milk solid fat getting a uniform consistency in order to determine the percentage in their completeness. Thus, the law on the point is that if possible, the sample purchased for analysis should be made homogeneous and representative in character. It is an admitted position that the sample purchased by the Food Inspector in this case was not made homogeneous at all and, therefore, the learned Magistrate has rightly given the benefit of doubt to the respondents no.1 to 3 because in order to preserve turmeric powder, some preservative might have been added by the vendor.

9. This is an acquittal appeal in which Court would be slow to interfere with the order of acquittal. The sample of food was taken on April 4, 1986 and about 15 years have passed. The appeal is being heard after 11 years and, therefore, though the offences prescribed under the Act should be viewed seriously because the offences have the deleterious effect playing havoc with the health and well-being of a large segment of the society. I am of the view that passage of time coupled with the finding that there was marginal adulteration would certainly be a disincentive to interfere with the

order of acquittal. Infirmities in the prosecution case go to the root of the matter and strike a vital blow on the prosecution case. In such a case, it would not be safe to set aside the order of acquittal, more particularly when the evidence has not inspired confidence of the learned Judge who had opportunity to observe demeanour of the witnesses. As I am in general agreement with the view expressed by the learned Judge, I do not think it necessary either to reiterate the evidence of prosecution witnesses or to restate the reasons for acquittal given by the learned Judge and in my view, expression of general agreement with the view taken by the learned Judge would be sufficient in the facts of the case. This is so, in view of the decisions rendered by the Supreme Court in the cases of (1) Girija Nandini Devi & ors. v. Bijendra Narain Chaudhar, A.I.R. 1967 S.C. 1124, and (2) State of Karnataka v. Hema Reddy and another, A.I.R. 1981 S.C. 1417. On overall appreciation of evidence, I am satisfied that there is no infirmity in the reasons assigned by the learned Judge for acquitting the respondent. Suffice it to say that the learned Judge has given cogent and convincing reasons for acquitting the respondent. The learned Additional Public Prosecutor has failed to convince me to take the view contrary to the one already taken by the learned Judge and, therefore, the appeal is liable to be rejected.

For the foregoing reasons, I do not see any merits in the appeal. The appeal, therefore, fails and is dismissed.

(J.M.Panchal,J.)

(patel)